

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

SAN KOUAY SAEYANG,	)	
	)	
Petitioner,	)	CASE NO. C07-1092-JCC-JPD
	)	
v.	)	
	)	
TIMOTHY WENGLER,	)	REPORT AND RECOMMENDATION
	)	
Respondent	)	
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INTRODUCTION AND SUMMARY CONCLUSION

Petitioner San Kouay Saeyang is currently in the custody of the Washington Department of Corrections pursuant to a judgment of the King County Superior Court. He has filed a petition for writ of habeas corpus under 28 U.S.C. § 2254 seeking relief from his 2004 convictions on charges of first degree robbery and first degree burglary. Respondent has filed an answer to the petition together with relevant portions of the state court record. The briefing is now complete and this matter is ripe for review. Following careful consideration of the record, this Court concludes that petitioner's § 2254 petition should be denied and this action should be dismissed with prejudice.

## FACTUAL AND PROCEDURAL HISTORY

The Washington Court of Appeals, on direct appeal of petitioner's conviction, summarized the facts of petitioner's crimes as follows:

Pharat Roeuth invited his friend Nak Ly and an acquaintance, Buntha Earng, to his house to play video games. Earng arrived by himself and told Roeuth that Ly was on his way. After Roeuth invited Earng inside, Earng produced a pistol, racked a round into its firing chamber and held the pistol to Roeuth's head. Earng commanded Roeuth to tell him where he kept his cash, and called another man, unfamiliar to Roeuth, into the apartment. The other man pointed another handgun at Roeuth and Earng went into Roeuth's bedroom and took Roeuth's hidden cash. While Earng was in the bedroom, the other man took jewelry Roeuth was wearing. Earng and the other man left, threatening Roeuth not to involve police. The entire incident took no more than five minutes.

Ly arrived later, and persuaded Roeuth to call police. Based on Roeuth's description and information about Earng's associates, officers constructed a photographic montage that included a picture of the defendant, San Saeyang. Roeuth immediately identified Saeyang's picture with 100 per cent certainty as the man who had taken his jewelry. Two days later, police located and arrested Earng in a park and Saeyang in the bedroom of a nearby house. Saeyang was sitting on a bed a short distance away from a shotgun and a bag containing three pistols.

Saeyang was charged with first degree robbery and first degree burglary, each crime alleged to have been committed while armed with a firearm. Earng received the same charges. The defendants were tried together.

Before trial, defense counsel jointly moved to exclude any reference to the four firearms found in the bedroom with Saeyang. In response, the prosecutor indicated she did not intend to refer to the shotgun but argued the handguns were relevant in light of the handguns used in the robbery. After discussing a procedure for Roeuth to view the pistols, the court denied the defense motion.

In her opening statement, the prosecutor referred to the shotgun and the three handguns. Neither defense counsel objected at the time, but counsel later jointly moved for a mistrial based on the mention of the shotgun. The court denied the mistrial, noting the jury would receive the standard instruction to disregard unsupported argument, and offered to give an additional specific curative instruction. Counsel for each defendant declined. The shotgun was not mentioned again during the trial in evidence or argument.

1           The State presented evidence of the entire encounter between Roeuth and the  
2 defendants and did not elect to rely on any specific part of the incident to prove the  
3 charges. Neither the State nor either of the defendants proposed an instruction  
4 requiring the jury to be unanimous about any particular act by either of the  
5 codefendants that constituted the robbery and the court gave no such instruction. In  
6 addition to identifying each defendant, Roeuth identified one of the three recovered  
handguns as very similar to the gun Earng used in the robbery. The jury rejected  
Saeyang's defense that he was misidentified and Earng's alibi defense and found both  
men guilty.

7 (Dkt. No. 12, Ex. 2 at 1-3.)

8           On January 7, 2005, petitioner was sentenced to a total term of confinement of 197 months.  
9 (*Id.*, Ex. 1 at 4.) Petitioner appealed his conviction to the Washington Court of Appeals. (*Id.*, Ex. 3.)  
10 In his brief of appellant, prepared by his appellate counsel, petitioner argued that he was denied his  
11 right to a unanimous jury when the trial court failed to instruct the jury it had to be unanimous as to  
12 the act constituting the robbery, and that the prosecutor's reference to a shotgun in opening  
13 statements denied him a fair trial. (*See id.*) Petitioner presented a number of additional grounds for  
14 relief, *pro se*, in a statement of additional grounds for review. (*Id.*, Ex. 5.) On July 31, 2006, the  
15 Court of Appeals affirmed petitioner's conviction. (*Id.*, Ex. 2.)

17           Petitioner thereafter filed a petition for review in the Washington Supreme Court. (*Id.*, Ex.  
18 6.) Petitioner argued in his petition for review that his right to a unanimous jury was violated when  
19 the trial court failed to properly instruct the jury and that his right to a fair trial was violated when the  
20 prosecutor mentioned a shotgun during her opening statement. (*See id.*) The Supreme Court denied  
21 review without comment on June 6, 2007. (*Id.*, Ex. 7.) And, the Court of Appeals issued its mandate  
22 terminating direct review on July 6, 2007. (*Id.*, Ex. 8.) Petitioner now seeks federal habeas review of  
23 his convictions.  
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1 if the state court decides a case differently than the Supreme Court has on a set of materially  
2 indistinguishable facts. *See Williams v. Taylor*, 529 U.S. 362 (2000). Under the “unreasonable  
3 application” clause, a federal habeas court may grant the writ only if the state court identifies the  
4 correct governing legal principle from the Supreme Court's decisions but unreasonably applies that  
5 principle to the facts of the prisoner's case. *Id.* The Supreme Court has made clear that a state  
6 court's decision may be overturned only if the application is “objectively unreasonable.” *Lockyer v.*  
7 *Andrade*, 538 U.S. 63, 69 (2003).

#### 9 Jury Unanimity

10 Petitioner asserts in his first ground for relief that he was denied his constitutionally protected  
11 right to a unanimous jury when the trial court failed to instruct the jury that it had to be unanimous as  
12 to the act constituting the robbery. Petitioner contends that the state produced evidence of two  
13 distinct acts which could form the basis of the robbery charge and because the state did not elect  
14 which of the two acts it intended to rely upon for conviction, the trial court was required to instruct  
15 the jury that it had to unanimously agree on the same criminal act for conviction. Petitioner relies  
16 upon the Washington Supreme Court's decisions in *State v. Kitchen*, 110 Wn.2d 403 (1988), and  
17 *State of Washington v. Petrich*, 101 Wn.2d 566 (1984), to support his argument that a unanimity  
18 instruction was required.  
19

20 The Washington Court of Appeals, on direct review of petitioner's conviction, rejected  
21 petitioner's claim that he was entitled to a unanimity instruction. The Court of Appeals explained  
22 that, under Washington law, a unanimity instruction is not required where the defendant's acts form a  
23 continuing course of criminal conduct. The Court of Appeals concluded that “the facts of this case  
24 clearly presented a continuing offense.” (Dkt. No. 12, Ex. 2 at 4-5.)  
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1 While petitioner alleges that the trial court's failure to give a unanimity instruction implicates  
2 both state and federal constitutional concerns, the crux of his argument is that, under the facts of his  
3 case, state law required a unanimity instruction be given and the Court of Appeals erred in concluding  
4 otherwise. Federal habeas relief does not lie for errors of state law. *Lewis v. Jeffers*, 497 U.S. 764,  
5 780 (1990) (citing *Pulley v. Harris*, 465 U.S. 37, 41 (1984)). Moreover, it is not the province of  
6 federal habeas courts to re-examine state court conclusions regarding matters of state law. *Estelle v.*  
7 *McGuire*, 502 U.S. 62 (1991); *Jeffries v. Blodgett*, 5 F.3d 1180, 1192 (9th Cir. 1993), *cert. denied*,  
8 510 U.S. 1191 (1994). Because the Washington Court of Appeals concluded that a unanimity  
9 instruction was not required under state law, petitioner's claim that he was denied his right to a  
10 unanimous jury on the robbery charge is not cognizable in these proceedings.

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12 Even assuming petitioner's claim can properly be construed as one raising federal  
13 constitutional concerns, he is not entitled to relief in these proceedings because his claim is not based  
14 upon clearly established federal law as determined by the United States Supreme Court. In fact, the  
15 Supreme Court has made clear that jury unanimity as to the means by which a crime is committed is  
16 not required. *See Schad v. Arizona*, 501 U.S. 624 (1991). In *Schad*, the Supreme Court stated that

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18 We have never suggested that in returning general verdicts . . . the jurors  
19 should be required to agree upon a single means of commission, any more than the  
20 indictments were required to specify one alone. In these cases, as in litigation  
21 generally, "different jurors may be persuaded by different pieces of evidence, even  
22 when they agree upon the bottom line. Plainly there is no general requirement that the  
23 jury reach agreement on the preliminary factual issues which underlie the verdict."  
24 *McKoy v. North Carolina*, 494 U.S. 433, 449, 110 S.Ct. 1227, 1236-1237, 108  
25 L.Ed.2d 369 (1990) (Blackmun, J., concurring) (footnotes omitted).

26 *Schad*, 501 U.S. at 631-32.

As petitioner has not established that his first ground for relief alleges a claim implicating  
federal constitutional concerns, and as it appears there is no federal constitutional basis for his jury

1 unanimity claim, petitioner's federal habeas petition should be denied with respect to his first ground  
2 for relief.

### 3 Prosecutorial Misconduct

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5 Petitioner asserts in his second ground for relief that the prosecutor committed misconduct  
6 when she violated an *in limine* order suppressing a shotgun that was found by police in the room  
7 where petitioner was arrested. Petitioner contends that a mistrial should have been declared after the  
8 prosecutor referenced the shotgun during her opening statement, and that this instance of  
9 prosecutorial misconduct deprived him of a fair trial.

10 When a prosecutor's conduct is placed in question, the standard of review is the "narrow one  
11 of due process, and not the broad exercise of supervisory power." *Donnelly v. DeChristoforo*, 416  
12 U.S. 637, 642 (1974). This court cannot issue a writ of habeas corpus to state authorities unless the  
13 prosecutor's conduct "so infected the trial with unfairness as to make the resulting conviction a denial  
14 of due process." *Id.* at 643; *Darden v. Wainwright*, 477 U.S. 168, 181 (1986).

16 In order to assess a claim that a prosecutor's comments constitute a due process violation, it is  
17 necessary to examine the entire proceedings and place the prosecutor's statements in context. *See*  
18 *Greer v. Miller*, 483 U.S. 756, 765-66 (1987). Habeas relief can be granted if the prosecutor's  
19 improper comments "had substantial and injurious effect or influence in determining the jury's  
20 verdict." *See e.g., Brecht v. Abrahamson*, 507 U.S. 619, 637-38 (1993) (quoting *Kotteakos v. United*  
21 *States*, 328 U.S. 750, 776 (1946)).

23 The Washington Court of Appeals rejected petitioner's prosecutorial misconduct claim on  
24 direct appeal, explaining its conclusion as follows:

25 Saeyang also contends that the prosecutor's improper reference to the shotgun in her  
26 opening statement constituted misconduct that deprived him of a fair trial. We disagree.

1 When prosecutorial misconduct is alleged, the defendant bears the burden of  
2 establishing that the conduct complained of was both improper and prejudicial. State  
3 v. Stenson, 132 Wn.2d 668, 718 940 P.2d 1239 (1997). Even if a defendant proves  
4 that conduct by the prosecutor was improper, the misconduct will not constitute  
5 prejudicial error unless the appellate court determines there is a substantial likelihood  
6 that the misconduct affected the jury's verdict. State v. Brett, 126 Wn.2d 136, 175,  
7 892 P.2d 29 (1995).

8 The decision to deny a request for mistrial based upon prosecutorial  
9 misconduct lies within the sound discretion of the trial court; an appellate court  
10 determines only whether the misconduct, when viewed against the backdrop of all the  
11 evidence, so prejudiced the defendant that nothing short of a new trial can insure that  
12 the defendant will be tried fairly. State v. Lewis, 130 Wn.2d 700, 707, 927 P.2d 235  
13 (1996). Whereas here, the court instructs the jury to disregard statements of counsel  
14 that were not supported by the evidence, the jurors are presumed to abide by such  
15 instructions. State v. Weber, 99 Wn.2d 158, 166, 659 P.2d 1102 (1983).

16 On this record, Saeyang has not rebutted the presumption that the jury  
17 followed the instruction and disregarded the prosecutor's unsupported comment.  
18 Saeyang has not challenged the trial court's admission of the evidence of the three  
19 handguns, two of which Roeth believed were not involved in the robbery. Viewed  
20 against this evidentiary background, we cannot conclude the prosecutor's isolated  
21 sloppy and improper mention of the shotgun was so prejudicial that the trial court  
22 abused its discretion by failing to order a mistrial.

23 (Dkt. No. 12, Ex. 2 at 5-6.)

24 The Court of Appeals applied the proper standard in reviewing petitioner's prosecutorial  
25 misconduct claim and reasonably concluded that the prosecutorial misconduct did not deprive  
26 petitioner of a fair trial. The record before this Court reflects that the prosecutor referred to the  
27 shotgun only once, and that this reference was followed immediately by an acknowledgment that the  
28 shotgun was "not really relevant" to the proceedings. (See Dkt. No. 12, Ex. 10, Verbatim Report of  
29 Proceedings, November 22, 2004, Opening Statements.) The record also reflects that, while no  
30 cautionary instruction was requested or given following the opening statements, the jury was  
31 instructed at the conclusion of the case that the attorneys' remarks, statements and arguments were  
32 not evidence, and that they were to disregard any remark, statement or argument that was not



1 supported by the evidence. (See Dkt. No. 12, Ex. 9.) As noted by the Washington Court of Appeals,  
2 jurors are presumed to follow such instructions. See *Weeks v. Angelone*, 528 U.S. 225, 234 (2000),  
3 citing, *Richardson v. Marsh*, 481 U.S. 200, 211 (1987).

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5 Petitioner fails to offer any evidence or argument in these proceedings to persuade this Court  
6 that the prosecutor's isolated reference to the shotgun, when viewed in the context of the entire trial,  
7 "had substantial and injurious effect or influence in determining the jury's verdict." See *Brecht*, 507  
8 U.S. at 637. Accordingly, petitioner's federal habeas petition should also be denied with respect to  
9 his second ground for relief.

10 CONCLUSION

11 For the reasons set forth above, this Court recommends that petitioner's federal habeas  
12 petition be denied and that the petition and this action be dismissed with prejudice. A proposed order  
13 accompanies this Report and Recommendation.

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15 DATED this 26<sup>th</sup> day of November, 2007.

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18 JAMES P. DONOHUE  
19 United States Magistrate Judge  
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